

## IN THE MATTER OF

## S. M. FRANK &amp; COMPANY, INC.

COMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION  
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914

*Docket 2666. Complaint, Dec. 20, 1935—Decision, Sept. 16, 1936*

Where a corporation engaged in manufacture of a pipe designed for equipment with a filter by insertion and use in stem thereof, and in the sale of said pipe and filter for use in connection therewith to wholesalers and to large retailers in the various States and in the District of Columbia; in widely advertising its aforesaid pipes and filters under names "Medico" and "Frank", respectively, in periodicals of national circulation and others, and through display boards and window advertising and otherwise—

Represented that its said "Medico" pipe contained, and was to be used with, the "only filter in the world that really filters", or "the only filter that really filters", or "*THE* pipe filter that really filters", facts being there are other filters on the market which satisfactorily and efficiently serve purpose for which its said pipe filters generally are designed and used, and filter made and sold by it for use in its said "Medico" pipe was not the only one in the world that really filtered or only pipe filter that really performed such function;

With intent to induce prospective purchasers to buy its said pipes and filters in false belief that they were the only articles in existence and on the market which would satisfactorily serve the purpose for which such filters are used and for which it sold its said filter, and with capacity and tendency to mislead and deceive a substantial number of members of purchasing public and cause a substantial diversion of trade to it from its competitors, who do not thus falsely represent their products; to the substantial injury of actual or potential competition in interstate commerce:  
*Held*, That such acts and practices in the sale of said filter were to the prejudice of the public and competitors and constituted unfair methods of competition.

Before *Mr. Edward M. Averill*, trial examiner.

*Mr. Allen C. Phelps* for the Commission.

*Mr. Edward S. Rogers* and *Mr. Junius Parker* of Rogers, Ramsay & Hoge, of New York City, for respondent.

## COMPLAINT

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission having reason to believe that S. M. Frank & Company, Inc., a corporation, hereinafter referred to as the respondent, has been and is using unfair methods of competition

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in commerce as "commerce" is defined in said act, and it appearing to the said Federal Trade Commission that a proceeding by it in respect thereof would be in the interest of the public, the said Federal Trade Commission hereby issues its complaint against the respondent and states its charges in that respect as follows:

PARAGRAPH 1. That the respondent, S. M. Frank & Company, Inc., is a corporation organized, existing, and doing business under the laws of the State of New York, with its principal place of business in the city of New York, in the State of New York. That said respondent is and has been for more than one year last past, engaged in manufacturing smoking pipes and in selling such pipes to purchasers located in States other than the State of New York, and pursuant to such sales and as a part thereof, causes and has caused said pipes so sold to be transported from its place of business in the State of New York into and through States other than the State of New York to said purchasers in the States in which they are located.

PAR. 2. That during all of said time stated in paragraph 1 hereof, there have been and now are other persons, firms, and corporations engaged in the business of manufacturing and selling smoking pipes similar to those sold by respondent, and, pursuant to such sales and as a part thereof, have caused and do cause such pipes to be shipped to customers located in States other than the States of origin of such shipments, and with such other persons, firms, and corporations respondent has been and is in substantial competition.

PAR. 3. That the said respondent, in the course and conduct of its business as described in paragraph 1 hereof, adopted as a trade name or brand for certain of the pipes manufactured and sold by it as aforesaid, the word "Medico," and uses and features, and has used and featured, said word "Medico" in advertisements which it causes and has caused to appear in magazines and newspapers of wide circulation throughout the several States of the United States, and in other printed advertising matter circulated, distributed, and displayed to and among respondent's customers and prospective customers, and consumers and prospective consumers of its pipes in various States other than the State of New York. That the use by the respondent of the said trade name or brand, "Medico," in its advertising, as aforesaid, tends to mislead and deceive and does mislead and deceive many of respondent's customers and prospective customers, and many of the consumers and prospective consumers of the pipes sold by respondent, as aforesaid, into the belief that the pipes bearing the said trade name or brand "Medico" have been endorsed by the medical profession and are so constructed or treated as to eliminate or greatly reduce the harmful effects of ordinary pipe

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smoking and render said pipes more healthful to the smoker than pipes made by other manufacturers. That, in truth and in fact, the said pipes so manufactured and sold by respondent have not been endorsed or recommended by the medical profession, and are no less harmful and no more healthful to the smoker than many pipes made and sold by other manufacturers.

PAR. 4. That the pipes so manufactured and sold by respondent, as aforesaid, contain a so-called filter; that in the various advertisements which the respondent causes and has caused to be displayed, circulated and distributed to and among its customers and prospective customers and the consumers and prospective consumers of its pipes, as set forth in paragraph 3 hereof, respondent uses and features and has used and featured, in describing said filter, the words, "Only Filter In the World That Really Filters," and other statements and representations to similar effect. That, in truth and in fact, the filter used in the pipes manufactured and sold by respondent is not the only filter in the world that really filters, but, on the contrary, there are other pipes on the market which have filters that satisfactorily and efficiently serve the purpose for which filters are used.

PAR. 5. That the representations made by respondent, as described and set forth in paragraphs 3 and 4 hereof, have the capacity and tendency to mislead and deceive, and do mislead and deceive, many of respondent's customers and prospective customers and many of the consumers and prospective consumers of respondent's products into the erroneous belief that persons buying and smoking pipes manufactured by respondent and bearing the trade name or brand "Medico," as aforesaid, are obtaining the advantages of pipes that are endorsed by the medical profession and are so constructed or treated as to eliminate or greatly reduce the harmful effects of ordinary pipe smoking and render said pipes more healthful to the smoker than pipes made by other manufacturers, and are obtaining the further advantages of the only satisfactory and efficient filter on the market, whereas such representations are contrary to the true facts, as set forth in paragraphs 3 and 4 hereof.

PAR. 6. That there are among the competitors of respondent referred to in paragraph 2 hereof many who do not represent that the pipes manufactured and sold by them are endorsed or recommended by the medical profession or have any peculiarly healthful qualities or are free from the ordinary effects of pipe smoking; that there are also among such competitors many who manufacture pipes with satisfactory and efficient filters and who do not represent that their filters are the only filters that really filter;

and that the aforesaid acts and practices of respondent in making the representations set forth in paragraphs 3 and 4 hereof tend to divert and do divert business from and otherwise injure and prejudice said competitors.

PAR. 7. That the aforesaid acts and things done by respondent are all to the injury and prejudice of the public and the competitors of respondent in interstate commerce, within the intent and meaning of Section 5 of the said Act of Congress hereinabove entitled.

#### REPORT, FINDINGS AS TO THE FACTS, AND ORDER

Pursuant to the provisions of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," the Federal Trade Commission, on the 20th day of December 1935, issued and served its complaint in this proceeding upon the respondent, S. M. Frank & Company, a corporation, charging it with the use of unfair methods of competition in commerce in violation of the provisions of said act. After the issuance of said complaint and the filing of respondent's answer thereto, testimony and evidence in support of the allegations of said complaint were introduced by Allen C. Phelps, attorney for the Commission, before Edward M. Averill, an examiner of the Commission, theretofore duly designated by it, and in opposition to the allegations of the complaint by Edward S. Rogers and Junius Parker, attorneys for the respondent; and said testimony and evidence was duly recorded and filed in the office of the Commission. Thereafter the proceeding regularly came on for final hearing before the Commission on said complaint, the answer thereto, testimony and evidence, briefs in support of the complaint and in opposition thereto (oral arguments of counsel having been waived); and the Commission having duly considered the same and being now fully advised in the premises, finds that this proceeding is in the interest of the public, and makes this its findings as to the facts and its conclusion drawn therefrom:

#### FINDINGS AS TO THE FACTS

PARAGRAPH 1. The respondent, S. M. Frank & Company, Inc., is a corporation, organized, existing, and doing business under the laws of the State of New York, with its principal office, place of business and manufacturing plant in the city of New York, State of New York. Respondent is engaged in the manufacture in the State of New York and in the sale and distribution from said State in all

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States of the United States and in the District of Columbia of pipes, cigar holders, cigarette holders, pipe cleaners, and filters.

PAR. 2. Respondent, in the course and conduct of its said business, sells and distributes its products to wholesalers and to large retailers located at points in all States of the United States and the District of Columbia and causes its pipes and other merchandise to be transported from the State of New York, where manufactured, to, through, and into all of the States of the United States and the District of Columbia. Respondent is engaged in commerce between and among the several States of the United States.

PAR. 3. Respondent, in the course and conduct of its said business, is in substantial competition with manufacturers and distributors, in the State of New York and other States of the United States, who likewise manufacture, sell, and distribute in interstate commerce pipes, filters, cigar and cigarette holders, and kindred products used in smoking tobacco. Some of respondent's said competitors manufacture, sell and distribute between and among the various States of the United States smoking pipes and filters, for use in said pipes, which said filters are similar in design and intended for the same purposes as the filters so manufactured, sold, and distributed by respondent, and with such manufacturers and distributors respondent is in direct and substantial competition.

PAR. 4. Respondent has adopted and used as a name for its pipe, designed to be equipped with a filter, the word "Medico", and identifies the filters sold by it for use in said "Medico" pipe by the trade name Frank absorbent filter. Said filter is sold for insertion and use in the stem of the pipe for the purpose of filtering the smoke from the tobacco in the bowl before it is taken into the mouth of the smoker, and to collect and retain saliva and liquids formed or present in the smoking operation. Respondent has widely advertised said "Medico" pipe and Frank absorbent filter in all States of the United States and the District of Columbia by means of printed advertisements in magazines of national circulation and in other periodicals, by the use of display boards and window advertising, and in other ways, and in said advertisements has represented to the general public all over the United States that the "Medico" pipe contains and is to be used with a filter which is the "only filter in the world that really filters", or the "only filter that really filters", or "*THE* pipe filter that really filters".

PAR. 5. There are in existence and on the market in the United States some pipe filters other than respondent's filter which satisfactorily and efficiently serve the purpose for which pipe filters are used and which satisfactorily and efficiently serve the purpose for which

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respondent's filter is designed and used. In truth and in fact, the filter manufactured and sold by respondent for use in the "Medico" pipe is not the only filter in the world that really filters, nor is it the only pipe filter that really filters.

PAR. 6. The purpose and intent of respondent in making the above representations to the public concerning the Frank absorbent filter sold for use in the "Medico" pipe has been to induce prospective purchasers to buy said pipe and filters in the false belief that there was no pipe or filter in existence on the market which would satisfactorily serve the purpose for which pipe filters are used, and for which respondent sold its said pipe filter. Such false representations so made by the respondent have, and have had, the capacity and tendency to mislead and deceive a substantial number of the members of the purchasing public, and to cause a substantial diversion of trade to respondent from its competitors who do not so falsely represent their products. By the acts and practices of the respondent, hereinabove described, substantial injury has been done and is now being done by respondent to actual or potential competition in interstate commerce.

PAR. 7. The evidence in the record in this matter fails to establish by substantial proof that the use by respondent of the trade name "Medico" for its said pipe is false and misleading.

## CONCLUSION

The aforesaid acts and practices of said respondent (except the acts and practices referred to in paragraph 7 above) under the conditions and circumstances described in the foregoing findings are to the prejudice of the public and of respondent's competitors, are unfair methods of competition in commerce, and constitute a violation of Section 5 of an Act of Congress approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes."

## ORDER TO CEASE AND DESIST

This proceeding having been heard by the Federal Trade Commission upon the complaint of the Commission, the answer of respondent, testimony and evidence taken before Edward M. Averill, an examiner of the Commission theretofore duly designated by it, in support of the allegations of said complaint and in opposition thereto, briefs filed on behalf of the Federal Trade Commission and the respondent, and the Commission having made its findings as to the facts and conclusion that the respondent, S. M. Frank & Company,

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Inc., a corporation, has violated the provisions of an Act of Congress, approved September 26, 1914, entitled "An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes," and the Commission being fully advised in the premises;

*It is now ordered*, That the respondent, S. M. Frank & Company, Inc., a corporation, and its officers, agents, representatives, and employees, in connection with the sale of smoking pipes and filters for use in smoking pipes, in interstate commerce, cease and desist from:

(1) Representing, or causing to be represented, directly or by implication, through advertising literature, display cards, printed advertisements in newspapers, magazines, or other periodicals, oral statements, or in any other manner, that the filter sold for use in the "Medico" pipe, and known as the Frank absorbent filter, is the only filter in the world that really filters, or that it is the only filter that really filters, or that it is *THE* pipe filter that really filters.

(2) Representing, directly or by implication, in any manner, that there are no pipe filters other than the said Frank absorbent filter, in existence or on the market, which will efficiently and satisfactorily accomplish the ends and serve the purposes for which respondent's said filter is designed, sold, and used.

*And it is hereby further ordered*, That the respondent shall, within 90 days from the date of service upon it of this order, file with the Commission a report in writing, setting forth in detail the manner and form in which it has complied with the order to cease and desist hereinabove set forth.

## Syllabus

## IN THE MATTER OF

DALLAS E. WINSLOW, INC., TRADING AS DURANT  
MOTOR CAR COMPANYCOMPLAINT, FINDINGS, AND ORDER IN REGARD TO THE ALLEGED VIOLATION  
OF SEC. 5 OF AN ACT OF CONGRESS APPROVED SEPT. 26, 1914*Docket 2628. Complaint, Nov. 14, 1935—Decision, Sept. 21, 1936*

Where a corporation engaged in sale of automobile parts and accessories as successor, elsewhere, to concern which, following purchase from receiver of unassembled parts of Durant Motor Company, theretofore assembler and distributor of Durant, Star, and Rugby cars, entered upon and widely advertised business of selling replacement parts for said automobiles, but which, as stock of parts thus bought at plant of said motor company became depleted, began purchase of new supplies from the manufacturers so that parts advertised, sold, and distributed by it came to consist, to a substantial extent, of those derived from sources other than said company—

(a) Adopted and used as a trade name, in soliciting and selling its said products, words "Durant Motor Car Company", and made use of and featured word "Durant" and purchase of authorized or genuine Durant parts and direct from factory service, through such statements in catalogues and other advertisements and advertising matter as "Buy only authorized Durant parts direct from the factory", "Prices again slashed for genuine Durant parts," " \* \* \* We now take a pardonable pride in making the statement that today Durant owners can buy from us genuine parts for their cars MORE CHEAPLY THAN EVER BEFORE IN DURANT HISTORY. Durant Motor Car Company, Lansing, Michigan," and "We've turned the plant upside down to serve you EVEN BETTER THAN BEFORE. Direct from the factory \* \* \* Durant Motor Car Company, Lansing, Michigan";

(b) Set forth in catalogues depiction of large plant occupied by Durant Motor Car Company prior to its adjudication as bankrupt, together with title, "The Durant factory at Lansing, Michigan", and made such statements as "Every replacement part you order is shipped to you from this mammoth plant", and invited customer's cooperation by purchasing all parts made from it so as to assist in maintaining "this most important and economical direct factory service", and invited prospective purchasers to "Send all orders for Star parts direct to the factory. Durant Motor Car Company, Lansing, Michigan";

Notwithstanding fact receiver's bill of sale of unused parts did not convey last-named company's good-will or right to use its name, and none of parts thus advertised, sold, and distributed were made by such corporation or by its predecessor nor, in substantial portion, by the Durant Motor Company, and neither it nor its predecessor owned or operated any factory wherein such parts were fabricated;

With tendency and capacity to confuse, mislead and deceive purchasers into belief that it was the Durant Motor Car Company or successor thereto,